S.Ct. No. 77507-9
CoA No. 52824-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

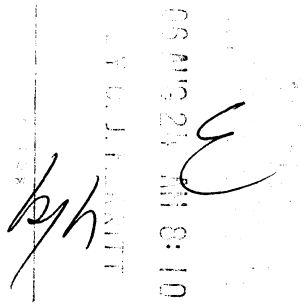
STATE OF WASHINGTON,

Respondent,

v.

KIM HEICHEL MASON,

Petitioner.



ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

PETITIONER'S SUPPLEMENTAL BRIEF

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A. ISSUES PRESENTED.

Did the court violate Kim Mason's right to confront his accusers by permitting the prosecution to rely on out-of-court "testimonial" statements by the decedent in a homicide case to police officers and others when those statements may be objectively viewed as calculated to provide incriminating information to the authorities for potential use in a criminal prosecution? Did the further constitutional and evidentiary errors raised in the petition for review and fully briefed below, and incorporated herein by reference, deny Mason a fair trial?

B. SUMMARY OF THE CASE.

In January 2001, Herberto Santoso went to a police station and accused Kim Mason of assaulting, threatening, and restraining him against his will. 4/30/03RP 119-27. The police investigated and the prosecution charged Mason with several offenses against Santoso. 5/29/03RP 4.

On February 20, 2001, Santoso disappeared. The police found blood matching his DNA inside his apartment and inside his car, which was in the parking lot at SeaTac airport. 4/22/03RP 38; 4/23/03RP 113. They also found blood from a second source inside Santoso's car. 6/4/03RP 82. The police never located Santoso's body or expressly confirmed he died.

Kim Mason was charged with murdering Santoso. CP 11-12. At trial, the State relied on Santoso's numerous out-of-court statements to the police and others to demonstrate Mason's alleged prior violent conduct toward Santoso, Santoso's belief Mason was going to kill him, and the likelihood that Santoso was not merely hiding or relocated. The facts are further recounted in Appellant's Opening Brief, pages 4-6, and the Court of Appeals decision. State v. Mason, 127 Wn.App. 554, 558-60, 126 P.3d 34 (2005), rev. granted, 157 Wn.2d 1007 (2006).

C. ARGUMENT.

THE COURT VIOLATED MASON'S RIGHT TO CONFRONT WITNESSES AGAINST HIM.

1. The confrontation clause prohibits the State from using accusatory statements by an absent declarant. The Sixth Amendment affirmatively grants and strictly protects certain procedural rights accorded a person accused of a crime, including the right to an attorney, the right to trial by jury, and the right to confront one's accusers. Crawford v. Washington, 541 U.S. 36, 60-61, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); Duncan v. Louisiana, 391 U.S. 145, 153, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). The Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." 541 U.S. at 68.

> Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

Id. at 69; accord United States v. Gonzalez-Lopez, _ U.S. _, 126 S.Ct. 2557, 2563, 165 L.Ed.2d 409 (2006) (Sixth Amendment requires "a particular guarantee of fairness," i.e. confrontation).

While Crawford refashioned the critical inquiry in determining the scope of the confrontation clause, the decision was based on long-accepted notions of the importance of confrontation and cross-examination. "The right to confront one's accusers is a concept that dates back to Roman times." 541 U.S. at 43. The Bible refers to the right to confront one's "accuser" in several significant and influential passages.[1] While the notion of confronting one's accuser dates from ancient times, the American colonies were particularly cognizant of the necessity of mandatory procedural requirements to ensure a fair adversary system, and

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[1] "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges." Book of Acts 25:16, quoted in Coy v. Iowa, 487 U.S. 1012, 1015-16, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988).

In John 8:7, when a woman accused of adultery is brought before Jesus, Jesus challenges "him that is among you without sin" to cast the first stone, upon which the accusers left and Jesus let the woman go. Commentators have interpreted this passage to mean that no one may be condemned without an accuser and the accuser must be willing to expose his or her allegations to scrutiny including questions about the accuser's own character. Charles Allen Wright & Kenneth W. Graham, Federal Practice and Procedure: Evidence section 6342, at 241-42 & n.403 (1997); Michael Dalton, The Country Justice 379 (1746).

developed a firm right of confrontation from the time of the American Revolution. Jonakait, R., The Origins of the Confrontation Clause: An Alternative History, 27 Rutgers L.J. 77, 109-112 (Fall 1995) (tracing development of right of confrontation in American colonies); see Crawford, 541 U.S. at 48-50.

"[A]n out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused." Bruton v. United States, 391 U.S. 123, 138, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (Stewart, J., concurring) (emphasis added); accord California v. Green, 399 U.S. 149, 179, 90 S.Ct. 1930, 26 L.ED.2d 489 (1970) (Harlan, J., concurring) ("[T]he Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses.") (emphasis added).

2. Statements to police officers investigating a completed crime are testimonial. In Davis v. Washington, __ U.S. __, 126 S.Ct. 2266, 2278, 165 L.Ed.2d 224, 237 (2006), the Supreme Court ruled that statements deliberately recounting how potentially criminal acts began and progressed are "inherently testimonial." Moreover, "[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." Crawford, 541 U.S. at 52.

In the case at bar, Corporal John Haslip repeated, in an essentially verbatim fashion, what Santoso told him at the police station accusing Mason of criminal acts. 4/8/03RP 113-14, 119-29 (officer's response to questions, beginning with "What did he [Santoso] say happened?"). Santoso's statements to the police about Mason, given to the police for the purpose of explaining "what had happened to him," were testimonial and their admission violated Mason's right to confront his accusers. 4/18/03RP 114; Davis, 126 S.Ct. at 2278.

3. Statements admitted as "background" or "state of mind" hearsay exceptions violated the confrontation clause. The confrontation clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." 541 U.S. at 59. However, the mere claim that statements are not admitted for their truth does not void the procedural protections required by the Confrontation Clause.

a. The "state of mind" hearsay exception is not a backdoor to introduce otherwise inadmissible hearsay under the guise of explaining details of a police investigation. It has long been recognized that "background" evidence or the "state of mind" exception to the hearsay rule are not excuses for permitting police officers to repeat the details of out-of-court accusations. United States v. Maher, 454 F.3d 13, 2006 U.S.

App. LEXIS 16846, *17 (1st Cir. 2006) (quoting 2 Broun, et al, McCormick on Evidence, § 249, at 103 (5th ed. 1999));[2] Duane, J., Arresting Officers and Treating Physicians: When May a Witness Testify to what Others Told Him for the Purpose of Explaining his Conduct?, 18 Regent U.L.Rev 229, 231 n6&7 (2005) (listing cases where courts have "held time and time again" that it is error to admit details of incriminating complaints about the accused for purported need to explain police conduct).

Even under hearsay rules, if the jury is likely to consider a statement for its truth, and significant prejudice may result, it is insufficient to merely identify a relevant non-hearsay rule. United States v. Reyes, 18 F.3d 65, 70 (2nd Cir. 1994); see K. Tegland, Wash. Practice

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[2] According to McCormick,

> The officers . . . .. .should not, however, be allowed to relate historical aspects of the case, such as complaints and reports of others containing inadmissible hearsay. Such statements are sometimes erroneously admitted under the argument that the officers are entitled to give the information upon which they acted. The need for this evidence is slight, and the likelihood of misuse great. McCormick, at 103 (emphasis added).

and Procedure, Evidence, section 803.16, 459 (4th ed. 1999); ER 403 (barring evidence if more prejudicial than probative).[3]

In Maher, a police officer testified that William Johnson told him Maher "may be involved in criminal activity," and then he investigated Maher. 2006 U.S. App. LEXIS, *18. Johnson's statement was made to the police in the course of an investigation and Johnson would have known it would be used in a criminal investigation. Id. Maher deemed Johnson's statements to the police officer "testimonial" despite a limiting instruction from the trial court that the information was not to be used for its truth. Id. at *19.

Similarly, in United States v. Silva, 380 F.3d 1018, 1019 (7th Cir. 2004), a police officer testified about what an informant told him about a plan for "Juan," Silva's first name, to deliver drugs. The trial court told the jury such information was not admitted "for the truth of the matter," but the Seventh Circuit found its admission violated the confrontation clause regardless of the limiting instruction. Id. at 1020 ("Allowing agents

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[3] See also United States v. Fountain, 2 F.3d 656, 669 (6th Cir. 1993) (where purported "scene setting" evidence irrelevant since motives of police of no material consequence, evidence must have been intended to establish truth of matter asserted and not purported non-hearsay reason); Stewart v. Cowan, 528 F.2d 79, 86 n.4 (6th Cir. 1976) (declarant's statements implicating appellant go to heart of prosecution's case and therefore may not be admitted under the exception for explaining why police took certain actions).

to narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination, would go far toward abrogating the defendant's rights under the sixth amendment. . . .").

In Reyes, a customs agent explained how law enforcement conducted their investigation of a drug conspiracy, purportedly to explain the agent's state of mind as she collected evidence. 18 F.3d at 67. For example, she said she seized a matchbook cover because one of the coconspirators told her it was significant. When asked its significance, the agent said that the coconspirator had told her it had beeper numbers for people he was supposed to contact to arrange the drug purchase. Id. at 68. One of these numbers belonged to the defendant. Id.

Reyes rejected the prosecution's contention that the witness must repeat the out-of-court statement verbatim to violate the hearsay rules, since the agent conveyed the substance of those out-of-court accusations. Id. at 69. The court further rejected the notion that the limiting instruction cured the possibility of misuse, since the evidence was inculpatory, was not particularly significant for any other purpose, and the prosecutor urged the jury to use it for its truth. Id. at 70-72.

In the case at bar, the court admitted Santoso's allegations against Mason in great detail, under the guise of explaining why the police seized

evidence from Mason's apartment. Officers said they seized particular objects because Santoso "told them" Mason used them in the incident.[4] Detective Berberich testified that this corroboration made Santoso's claims more believable. 4/10/03RP 85. The prosecutor emphasized in his closing argument that the police corroborated all of Mr. Santoso's claims about the January 23rd incident, thereby urging the jury to consider Santoso's statements for their truth.

b. A limiting instruction does not render the statements non-testimonial or the improper admission harmless. As Maher, Silva, and Reyes illustrate, the mere fact that the court tells the jury that evidence is admitted for a limited purpose does not erase a confrontation clause violation when the jury may have relied on the plainly probative information, or when the prosecution undermines the limiting instruction by urging the jury to consider the information for the truth of the matter asserted. Bruton, 391 U.S. at 129; Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987); Shepard v. United States, 290 U.S. 96, 104 (1933) (rejecting notion jury could properly apply limiting instruction to evidence accusing defendant of criminal conduct as, "Discrimination so subtle is a feat beyond the compass of ordinary

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[4] Examples of such testimony are detailed in Appellant's Opening Brief, p. 13.

minds."); State v. Parr, 93 Wn.2d 95, 107, 606 P.2d 263 (1980) (limiting instruction does not "alleviate prejudice" from statement accusing defendant of prior violent acts and threats improperly admitted for complainant's state of mind).

In Bruton, the Court rejected the idea that a jury could hear a codefendant's statement incriminating the accused and be expected to follow an instruction to disregard that evidence in assessing the accused's guilt, even when the court issues repeated and clear limiting instructions. 391 U.S. at 129-30 (agreeing it is "impossible realistically" to believe the jury did not succumb to "the nigh irresistible temptation" to refer to the information provided for a limited purpose when assessing the accused's guilt). In Richardson, the Court further found that a jury cannot be expected to disregard a codefendant's statement, even when that statement contains no reference to the accused and the jury is told not to use it against the accused, if the prosecutor links the defendant to the codefendant's statement in closing argument and thus urges the jury to consider that statement as evidence against the accused. 481 U.S. at 211.

Simply put, the "state of mind" exception to the hearsay rule is not a license to undermine the rights guaranteed by the confrontation clause or a mechanism for introducing incriminating evidence that is not subject to

cross-examination. This Court recognized such a danger in Parr, when it reversed a murder conviction based on the State's introduction of evidence from the victim's brother that the victim said she feared the defendant and he had threatened her on another occasion. 93 Wn.2d at 107. The Parr Court found the hearsay statements describing Parr's prior threatening conduct could only be interpreted as evidence the defendant was a dangerous person, and despite the court's limiting instruction, such evidence impermissibly prejudiced the defendant. Id.; accord 18 Regent U.L. Rev. at 240 (limiting instruction "is folly" when jury told not to use incriminating evidence for its truth).

c. Here, the testimonial statements were used for their truth by the prosecutor and jury. Detectives Berberich, Malins, and Roze recounted what Santoso told them about Mason. 4/8/03RP 211-12; 4/9/03a.m.RP 52, 60, 65, 74, 77, 106; 4/9/03p.m.RP 5; 4/10/03RP 39, 42; 4/14/03RP 155-56, 160. They repeated Santoso's statements about how his personal history made him believe Mason would harm him. 4/10/03RP 47-48; 4/14/03RP 126-27. In closing argument, the prosecutor relied on the substance of Santoso's statements to police to explain that Santoso's story was true and Mason's was a "lie." See e.g., 6/10/03RP 4-5 (evidence seized "corroborated exactly what Mr. Santoso said . . . ."); Id.

at 103 (defending relevance of drawing taken from Mason's apartment because "Santoso said" he was looking at it when Mason choked him). Detective Berberich similarly stated that the evidence seized from the apartment corroborated Santoso's claims. 4/10/03RP 84. The officers' testimony followed and corroborated each detail Corporal Haslip recounted from Santoso, and the prosecution emphasized these details as proof Santoso told the truth both in his allegations and in his belief that Mason would kill him. Accordingly, it is folly to believe the jury did not use the details of Santoso's allegations against Mason for their truth.

4. Statements to a police department's victim advocate were testimonial. In Davis, the Supreme Court made plain that "testimonial" statements are not strictly limited to statements elicited by a law enforcement officer. 126 S.Ct at 2274 n.2. Davis also dispelled the notion that a statement is "testimonial" only if given in a formal setting or if the product of interrogation. Id. at 2274 n.1 ("volunteered testimony or answers to open-ended questions" not exempt from confrontation clause). The fact that repercussions could follow an untruthful statement provided sufficient "formality" under the Confrontation Clause. Id. at 2276 & 2278 n.5; see RCW 9A.84.040 (criminalizing false report of prior or impending

occurrence). Moreover, the State cannot evade the confrontation clause by receiving information informally. Id. at 2276.[5]

Davis drew a line between statements made in the course of an on-going emergency and those delivered to establish or prove events potentially relevant to a criminal prosecution. 126 S.Ct. at 2273-74. This ongoing emergency exception is a narrow one, limited to "current circumstances requiring police assistance," and once the perpetrator has left the scene, the ongoing emergency is over even if it is possible the perpetrator could return. Id. at 2276, 2277 ("the emergency appears to have ended (when Davis drove away from the premises).").[6]

In the case at bar, Detective Berberich took Santoso to meet with Linda Webb, an employee of the same police department investigating the accusations against Mason. 4/15/03RP 16-17, 21, 57. Detective Anne Malins told Santoso she "worked very closely with" Webb and often

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[5] As further indication of the Supreme Court's notion of "interrogation," it granted a certiorari petition and remanded for further consideration in light of Davis a case where the lower court found statements non-testimonial because they were made spontaneously to a police officer. State v. Forrest, 596 S.E.2d 22 (NC App 2004), remanded, 126 S.Ct.2977 (2006). Granting the petition and remanding the case indicates the Court believes the decision below rested on a premise that is no longer valid. Lawrence v. Chater, 516 US 163, 167, 116 S.Ct. 604, 133 L.Ed.2d 545 (1993).

people were more comfortable speaking with someone who was not a detective. 4/14/03RP 162-63.

Webb assisted complaining witnesses with obtaining no contact orders from the court. Id. at 10-12. She interviewed complainants about their allegations to see if a protection order was appropriate, helped complainants complete petitions for such court orders, accompanied petitioners to court to assist them in obtaining such orders, and kept in contact with them as their cases were pending. Id. at 10-12, 22-23. Her role is described as a member of the prosecution team, who "coordinate[s] with all members of the domestic violence team (law enforcement, prosecutors, treatment agencies, etc.)" and "work[s] closely with the county's prosecutors on their assigned cases."[7] A victim advocate, also called a "legal advocate," supports victims "through the court process. . .

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[6] The Supreme Court also granted certiorari, vacated and remanded in light of Davis cases where there was a threat of future danger from the perpetrator, thereby indicating that the mere fact the accused could return to the scene or commit future criminal acts does not render statements nontestimonial. State v. Wright, 701 N.W.2d 802, 804-05 (Minn. 2005), vacated, 126 S.Ct. 2979 (2006) and State v. Warsame, 701 N.W.2d 305, 307 (Minn. 2005), vacated, 126 S.Ct. 2983 (2006).

[7] King County Prosecuting Attorney, Protection Advocacy Program, Advocacy Services, http://www.metrokc.gov/proatty/POP/services.htm) (last accessed August 19, 2006)

."[8] Any violation of a court order of protection requires mandatory arrest. 4/15/03RP 11.

Webb interviewed Santoso, about his allegations against Mason as well as his background, to obtain information necessary for the petition. Id. at 17, 22-23. She wrote a report of her conversations with Santoso for the police detective. Id. at 48. She encouraged Santoso to file a petition for an anti-harassment order, wrote the petition for him, and took him to court to assist him with obtaining the court order. Id. at 23, 26, 29.

Santoso's statements to Webb related information to a police employee and member of the prosecution team about past events "potentially relevant to later criminal prosecution." Davis, 126 S.Ct. at 2274; 4/15/03RP 22 (Santoso"told me about what happened.") Several detectives specifically directed Santoso to speak with Webb. 4/9/03a.m.RP 88; 4/14/03RP 163. Santoso's statements to Webb are objectively viewed as calculated to pass information to the authorities available for use in a criminal proceeding.

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[8] See http://www.ci.redmond.wa.us/insidecityhall/police/investigations/family asp (last accessed Aug. 19, 2006) (Redmond police department web site, explaining "integral' work between detectives and victim advocates); 4/14/03RP 162 (Detective Malins calling Webb "legal advocate"); see also State ex. Rel. Brandenburg v. Blackmer, 110 P.3d 66, 71 (N.M. 2005) (victim advocate reasonably expected to communicate with prosecution, is part of prosecution, and is protected by work product doctrine).

Santoso's expressions of fear alone, "I am afraid," do not carry with them accusations or allegations about criminal conduct and thus may not rise to the level of testimonial. Davis, 126 S.Ct at 2274; Parr, 93 Wn.2d at 99. But the basis of the fear was Santoso's belief that Mason intended to harm him and, Santoso's efforts to provide such information to a member of the team investigating and prosecuting a criminal case must be viewed as testimonial. Id.

Webb testified that Santoso said he believed Mason would kill him or have others kill him. 4/15/03RP 39 (Santoso said Mason "was going to kill him, he knew he was going to die."). She related Santoso's explanation that in Indonesia, where he was from, a relative of a police officer who is accused of a crime can have the police kill the accuser, and he believed Mason would do that to him. Id. at 65. She also reported Santoso was reluctant to seek a no contact order because of his fear, that he did not accept offers to stay in a motel for a few days because he believed he needed more permanent assistance than a few days of shelter, that he begged to stay in the jail or in Webb's office to be safe from Mason, and that he could not relocate because he needed to keep his job so he could support his family in Indonesia which depended on him. Id. at 26,

35, 39, 41. This information was used for the truth of matters contained therein. See 6/10/03RP 101-2.

5. Statements of fear about Mason to other police officers. Santoso also told Detective Roze, one of the officers assisting with the investigation, that he was afraid to leave the police station and asked to sleep there or in a jail cell. 4/14/03RP 128. For the same reasons as discussed above, statements presenting a belief that Mason would harm him contain substantive allegations against Mason, provided to the police investigating a crime, and are testimonial.

6. Statements to non-police officers. The Court of Appeals ruled that Santoso's statements to non-police officers describing his allegations of past criminal conduct posed no possible confrontation clause violation. 127 Wn.App. at 565. But, Davis, to the contrary, explains that the confrontation clause is not strictly limited to statements elicited by or delivered to law enforcement officials. 126 S.Ct. at 2277. The operative question is not whether a police officer elicited the statements, but whether they were made "to establish or prove past events potentially relevant to later criminal prosecution." Id. at 2274.

In determining the scope of the confrontation clause, Davis relied upon King v. Brasier, 1 Leach 199, 200, 168 Eng. Rep. 202 (1779). In

Brasier, a girl reported a crime to her mother shortly after it occurred, but the mother was barred from testifying about this statement because the victim was "not sworn or produced as a witness on the trial." Davis acknowledged that the meaning of the Confrontation Clause is derived from cases such as Brasier, which demonstrate that reports of crimes to private individuals are inadmissible absent confrontation. 126 S.Ct. at 2277.[9]

In United States v. Cromer, 389 F.3d 662, 673 (6th Cir. 2005), the court agreed that, "A statement made by a person claiming to be the victim of a crime and describing the crime is usually testimonial, whether made to the authorities or not." (quoting Friedman, R., Confrontation: The Search for Basic Principles, 86 Geo. L.Rev. 1011, 1042-43 (1988)); see also Friedman, R. Grappling with the Meaning of "Testimonial", 71 Brook. L. Rev. 241, 260 (2005) ("If the declarant anticipates that the statement, or the information asserted in it, will be conveyed to the authorities and used

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[9] A number of similar cases were cited in the Brief of Petitioner in Davis and implicitly relied upon by the Davis Court. Brf. of Pet. p. 29 & n.6 (citing, for example, Weldon v. State, 32 Ind. 81, 82 (1869) (statements to parents "soon after" alleged assault inadmissible because no confrontation); Regina v. Guttridges, 173 Eng. Rep. 916 (1840) (fresh complaint to friend inadmissible because witness did not testify); People v. McGee, 1 Denio. 19, 22-24 (N.Y. 1845) (complaint immediately after incident to housekeeper improperly admitted without victim's testimony at trial)).

in prosecution, then it is testimonial, whether it is made directly to the authorities or not.").

In the case at bar, an emergency room doctor repeated Santoso's statements to him describing the incident and his belief Mason would kill him. 4/14/03RP 73-75. The doctor not only told Santoso to report the alleged offense to the police but after learning Santoso did not want to call the police, he contacted the police and told them about Santoso's allegations. Id. at 79.[10] Given the doctor's role in recording and repeating Santoso's statements to authorities, as well as discussing with him the importance of reporting his allegations to the police, a reasonable person in Santoso's shoes would have understood that the doctor would be preserving the information Santoso told him and would make it available to the police in a criminal investigation. Thus, Davis demonstrates the Court of Appeals erred by strictly limiting "testimonial" statements to those made to police officers.

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[10] Dr. Gross denied calling the police to report Santoso's allegations, but this claim is hard to reconcile with Corporal Haslip's testimony that he received a call from Dr. Gross on January 24, 2001, stating he was an emergency room doctor reporting an assault victim who came to the emergency room but who did not want to report the assault to police. 4/8/03RP 106-08. It is more likely that the emergency room doctor did not keep a record of this call or remember it when he testified at trial over two years after the incident.

7. The trial court did not abuse its discretion by rejecting the State's claim that Mason forfeited his rights of confrontation. The trial court properly ruled that the prosecution had not established Mason forfeited his right to confront his accuser under the doctrine of forfeiture by misconduct. 4/3/03RP 57-61. In the case at bar, the jury expressly rejected the allegation that Mason killed Santoso for the purpose of keeping him from testifying. CP 216. The jury's verdict is further evidence that the trial court correctly decided the evidence proffered did not establish Mason killed Santoso to keep him from testifying against him. The court's ruling was not manifestly untenable and should not be disturbed on appeal.[11]

Under some circumstances, when a person intends to undermine the judicial process by keeping a witness from testifying, courts have ruled that the accused has waived the right of confrontation. Reynolds v. United States, 98 U.S. 145, 158-59, 25 L.Ed. 2d 244 (1878). Until recently, this doctrine received very little attention from the Supreme Court and it has

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[11] This Court reviews evidentiary determinations such as the admissibility of statements of coconspirators for an abuse of discretion. State v. Guloy, 104 Wn.2d 412, 420-21, 705 P.2d 1182 (1985). An appellate court does not review factual determinations such as the credibility of witnesses or the weight accorded evidence unless manifestly unreasonable. In re Restraint of Gentry, 137 Wn.2d 378, 410-11, 972 P.2d 1250 (1999) (even if evidence is "conflicting," a challenged ruling not disturbed on appeal "so long as some reasonable interpretation of it supports the challenged findings.").

not been used in Washington cases. Mason, 127 Wn.App. at 570 (noting doctrine not expressly adopted in Washington).[12] In Reynolds, the court admitted into evidence an absent witness's testimony from a prior proceeding on the same issue, at which the defendant had the opportunity to cross-examine the witness. Id. at 161. Reynolds stated that the "modern view" permitted the admission of prior cross-examined testimony when the witness's unavailable because of the defendant's intentional efforts to keep the witness from testifying. Id. at 158-59 (describing accepted rule as when a party wrongfully keeps a witness away, "his testimony, taken on a former trial between the same parties upon the same issues, may be given in evidence."). Reynolds does not speak to the admissibility of uncross-examined out-of-court declarations.

In Davis, the court acknowledged principle of forfeiture by misconduct, which it described as grounded in notions of equity. 126 S.Ct. at 2280 (citing Crawford, 541 U.S. at 62, which cited Reynolds for

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[12] See Note, Expanding Forfeiture Without Sacrificing Confrontation After Crawford, 104 Mich. L.Rev. 599, 605 (2005) (noting sparse history of jurisprudence on confrontation clause forfeiture in Supreme Court precedent).

same proposition). The court took "no position" on the standards necessary to demonstrate forfeiture. Id.[13]

The Davis Court, which did not receive briefing or hear argument on the issues of forfeiture by misconduct except in passing, did not address the lack of uniformly agreed standards or the historical basis of this waiver doctrine. The Supreme Court has previously ruled that the Confrontation Clause may be waived only upon the voluntary relinquishment of a known right, and after indulging in all presumptions against waiver. Brookhart v. Janis, 384 U.S. 1, 4, 8, 86 S.Ct. 1245, 16 L.ED.2d 314 (1966); Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.ED. 1461 (1938). While the Supreme Court has found a defendant may waive the right to be present at trial by disregarding numerous warnings to cease grossly disruptive behavior upon penalty of removal from courtroom, or by voluntarily failing to attend trial, the right to presence is "distinct" and "dissimilar" to the right of confrontation.[14] The Supreme Court has not abandoned the Zerbst and Brookhart requirement of a knowingly and

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[13] Davis cited FRE 803(b)(6), promulgated in 1997, which provides an exception to the hearsay rules if the witness is unavailable for, "A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

[14] Kroger, John, The Confrontation Waiver Rule, 76 B.U.L. Rev. 835, 872 n.244 (1996), (discussing Illinois v. Allen 397 U.S. 337, 343, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), and Taylor v. United States, 414 U.S. 17, 94 S.Ct. 194, 38 L.Ed.2d 147 (1973)).

intelligent waiver of the right of confrontation. Id. Additionally, the notion that a waiver of a right of confrontation is analogous to the admission of statements of a co-conspirator, and is thus appropriate for a court to determine without heightened standards of proof, must be rejected since such statements must be made "during the course and in furtherance the conspiracy," and under Crawford, the Confrontation Clause simply does not apply. ER 801(d)(2).

In keeping with this precedent, this Court has acknowledged the high standards of proof required before it will find a person waived a Sixth Amendment right. State v. Crawford, 147 Wn.2d 424, 431 & n.2, 54 P.3d 656 (2004), rev'd on other grounds, 541 U.S. at 68. One commentator has suggested that a forfeiture by misconduct rule is constitutional only if it requires the voluntary relinquishment of a known right, the intent to keep the witness from testifying, as well as reliable proof of the out-of-court statements. 76 B.U.L. Rev. at 887. Other commentators have noted the potential to "eviscerate" the confrontation clause if forfeiture is "applied extravagantly." Hutton, C., Sir Walter Raleigh Revived: The Supreme Court Re-Vamps Two Decades of Confrontation Clause Precedent in Crawford v. Washington, 50 S.D. L.Rev. 41, 71 (2005); Lininger, T., Yes Virginia, There is a Confrontation Clause, 71 Brook. L.Rev. 401, 407

(2005) (former prosecutor warns against broad doctrine where "the forfeiture exception would swallow the rule").

Other states have had varying interpretations of the requirements of a waiver of the right of confrontation. By statute, Maryland requires a defendant intended to cause the witness's unavailability at trial, proved by clear and convincing evidence, and requiring a hearing out of the jury's presence before such evidence is admitted.[15] By common law, New York requires the prosecution to prove the defendant caused the witness's unavailability by clear and convincing evidence and waiver may not be predicated on wrongdoing that is the same as the acts charged. People v. Maher, 89 N.Y.2d 456, 462, 677 N.E.2d 728 (N.Y. 1997).[16] Other states have approved lesser standards of proof or have inferred waiver from the mere fact that the accused is alleged to have killed the declarant without evidence the misconduct occurred for the purpose of keeping the witness from testifying. People v. Moore, 117 P.3d 1, 5 (Colo. App. 2005); but see United States v. Houlihan, 92 F.3d 1271, 1280 (1st Cir. 1996) (requiring purposeful acts intended to keep witness from testifying).

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[15] Md. Code Ann., Ct. and Jud. Proc. 10-901 (2005).

Since Washington has not yet firmly defined the parameters of a forfeiture by misconduct rule, the prosecution may request this Court do so in the case at bar. However, the prosecution here must further contend with Article I, section 22, which expressly protects, in a mandatory fashion, the right to confront witnesses "face to face." State v. Foster, 135 Wn.2d 441, 473-74, 957 P.2d 712 (1998) Alexander, C.J., concurring in part, dissenting in part); 135 Wn.2d at 481-94 (Johnson, J., dissenting). The majority of Foster, formed by four dissenting justices and one concurrence, offered a detailed Gunwall[17] analysis, tracing the history, origins, and scope of the state constitution and its federal counterpart. The plurality concluded that the manner of confrontation required by the Washington Constitution mandates strict compliance with the express face-to-face language that may not be circumscribed. 135 Wn.2d at 483-84. Furthermore, this Court is constrained by the manner in which the confrontation clause was understood at the time of statehood. State v. Smith, 150 Wn.2d 135, 153, 75 P.3d 934 (2003).

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[16] See also State v. Ivy, 188 SW 3d 132, 147 (Tenn. 2006) (requiring proof murder defendant killed the declarant for the purpose of keeping from testifying); People v. Giles, 102 P.3d 930 (Cal. 2004) (granting review to decide whether forfeiture applies when the misconduct is the same as the offense for which the defendant is on trial); 71 Brook. L. Rev. at 407 (discussing rules used on various state and federal courts).

[17] State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

Consequently, the State's request that this court craft a forfeiture rule in the case at bar must comply with Washington's express declaration of the right to confront witnesses face to face as understood at the time of statehood. See Davis, 126 U.S. at 2277 (listing cases from 1800s regarding scope of confrontation clause); State v. Eddon, 8 Wash. 292, 305, 36 Pac. 139 (1894) (limiting weight accorded dying declaration due to lack of "truth eliciting cross-examination"); State v. Hunter, 18 Wash. 670, 52 Pac. 247 (1898) (prohibiting details of rape complaint to mother as "hearsay of the most dangerous character"); State v. Aldrick, 97 Wash. 593, 596, 166 Pac. 1130 (1917) (reversing conviction despite eyewitnesses due to improper admission of details of out-of-court accusation).

The "modern view" expressed in Reynolds was limited to prior confronted testimony. 98 U.S. at 158-59. At the least, the prosecution must prove purposeful and knowing relinquishment of a right of confrontation to protect the right of confrontation and the adversarial system as intended by the Framers. Crawford, 541 U.S. at 51.

8. The constitutional error requires reversal. The improperly admitted statements in violation of Mason's right of confrontation are harmless only if the State proves beyond a reasonable doubt they did not affect the outcome of the case. Chapman v. California, 386 U.S. 18, 24,

87 S.Ct. 824, 17 L.Ed.2d 705 (1967). When an error in the trial process is difficult to quantify and requires the court to speculate "into what might have occurred in an alternative universe," this ambiguity must favor the protection of the constitutional right. Gonzalez-Lopez, 126 S.Ct. at 2565 (rejecting harmless error analysis in violation of counsel of choice case due to intangible nature of harm).

The prosecution in the case at bar began the six week trial by having Corporal Haslip repeat the details of Santoso's allegations against Mason. Haslip's testimony formed the bedrock upon which the case rested: numerous witnesses repeated and corroborated the substance of Santoso's allegations as Haslip presented, either by mentioning them directly or by discussing information contained within Santoso's statement to Haslip. Officers further explained Santoso's fear Mason would kill him and why Santoso had such a fear.

By focusing its case on Santoso's out-of-court statements, Mason in turn was forced to elicit further details of the unconfronted allegations in the hope of impeaching Santoso's claims. Consequently, because of the prosecution's repeated reliance on Santoso's out-of-court statements, it is difficult to quantify the magnitude of the harm resulting from the prosecution's reliance on the erroneously admitted evidence as Mason

himself introduced Santoso's statements that would never have been part of the case had not the State first violated his right of confrontation. The State's repeated efforts to admit Santoso's statements and its vouching for the truth of these allegations in closing argument demonstrate their importance to the State's case against Mason. Santoso's statements to others surely affected the outcome of the trial and require reversal.

C. CONCLUSION.

For the foregoing reasons, Kim Mason respectfully requests this Court reverse his conviction and remand the case for further proceedings consistent with this Court's ruling.

DATED this 22nd day of August 2006.

Respectfully submitted,

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Washington Appellate Project (91052)
Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	NO. 77507-9
	)	
v.	)	
	)	
KIM MASON,	)	
	)	
PETITIONER.	)	

DECLARATION OF SERVICE

I, MARIA ARRANZA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 22ND DAY OF AUGUST 2006, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL:

[X] KING COUNTY PROSECUTOR'S OFFICE
APPELLATE UNIT
KING COUNTY COURTHOUSE
516 THIRD AVENUE, W-554
SEATTLE, WA 98104

[X] KIM MASON
DOC# 860319
MONROE CORRECTIONAL COMPLEX
PO BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF AUGUST, 2006.

X_____